Supreme Court, U.S.
FILED
AUG 28 1996
CLERK

No. 96-183

In The

Supreme Court of the United States

October Term, 1995

MICHAEL LEROY DOLIHITE, individually and as father and next friend of David Michael Dolihite, and JOYCE MAY DOLIHITE, individually,

Petitioners,

vs.

ROYCE KING, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

PHILIP S. GIDIERE, JR.
GIDIERE & HINTON
60 Commerce Street
Suite 904
Montgomery, Alabama 36104
(334) 834-9950

Counsel for Respondent Dr. Brad Mazick

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. Petitioner's challenge to the Jurisdiction of the Eleventh Circuit Court of Appeals is not applicable to the defendant Dr. Brad Mazick..... 3

II. Petitioner's challenge to the Eleventh Circuit's decision of *Lassiter vs. Alabama A & M* is not a compelling reason to issue a writ of certiorari in this case..... 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Anderson vs. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).....5, 8

Cohen vs. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).....3

Harlow vs. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).....5

Johnson vs. Jones, ___ U.S.___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).....2, 3, 4, 6, 7

Mitchell vs. Forsyth, 472 U.S. 511, 105 S.Ct. 806, 86 L.Ed.2d 411 (1985).....2, 3, 4, 6

Youngberg vs. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).....6

STATEMENT OF THE CASE

This statement of the case is confined to the events of this case concerning Dr. Brad Mazick only. The events pertinent to the codefendants and their positions with regard thereto are expected to be set forth in their briefs in opposition.

Dr. Brad Mazick was a clinical psychologist who was serving as the clinical director of the Eufaula Adolescent Center in 1992 while David Dolihite was a resident at that facility. David Dolihite attempted suicide on March 24, 1992 and on November 9, 1992 filed this complaint against Dr. Mazick alleging as a federal claim, that Dr. Mazick acted with deliberate indifference to David Dolihite's needs and that his conduct amounted to cruel and unusual punishment in violation of the rights secured to David Dolihite by the Eighth Amendment to the Constitution of the United States of America.[1] Dr. Mazick filed a motion for summary judgment asserting the defense of qualified immunity. The District Court denied the motion for summary judgment and refused to apply the defense of qualified immunity to the federal claims.

Dr. Mazick appealed to the Eleventh Circuit Court of Appeals, presenting the issue for review as follows:

> ***Is the Defendant Brad Mazick Entitled to the Defense of Qualified Immunity?***

---

[1] The complaint also contained various state law claims which were dismissed by the District Court and are therefore not at issue before this Court.

I. Was the alleged violated constitutional right clearly established?

II. Would a reasonable official have known that his alleged actions violated a constitutional right?

III. Was the evidence sufficient to show a violation of the "professional judgment standard" and/or the "deliberate indifference standard"?

The Eleventh Circuit Court of Appeals found that the core qualified immunity issue was raised and therefore it had jurisdiction to hear the appeal under *Mitchell vs. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) and *Johnson vs. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

Next, the Court of Appeals examined plaintiff's allegations against Dr. Mazick, taking all reasonable inferences in favor of the plaintiff Dolihite, and concluded that the case law was not clearly established that a reasonable professional possessing the knowledge that Dr. Mazick had would have known that his actions violated David Dolihite's constitutional rights. Therefore, the court held that Dr. Mazick was entitled to the defense of qualified immunity.

David Dolihite's petition for certiorari to this Court does not challenge the jurisdiction of the Court of Appeals to hear Dr. Mazick's appeal.

REASONS FOR DENYING THE WRIT

Petitioner presents two basic issues in his quest for the issuance of a writ of certiorari. Neither is a sufficient compelling reason to warrant granting of the writ.

I. PETITIONER'S CHALLENGE TO THE JURISDICTION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS NOT APPLICABLE TO THE DEFENDANT DR. BRAD MAZICK

The essence of plaintiff's first reason to ask for the issuance of a writ of certiorari is his complaint that the Eleventh Circuit exercised pendent appellate jurisdiction over the appeals of seven of the eight appealing defendants. Dr. Brad Mazick is the eighth of those appealing defendants. The petitioner makes no argument that the Eleventh Circuit did not have jurisdiction to hear Dr. Mazick's appeal on the qualified immunity issue and cannot make such an argument. The issues which form the basis of Dr. Mazick's appeal to the Eleventh Circuit are squarely within the ambit of the jurisdictional parameters set forth by this Court in *Johnson vs. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) and *Mitchell vs. Forsyth*, 472 U.S. 511, 105 S.Ct. 806, 86 L.Ed.2d 411 (1985).

Johnson reaffirmed the holding of *Mitchell vs. Forsyth*, which held that a district court's order denying a defendant's motion for summary judgment was an immediately appealable "collateral order" (i.e., a "final decision") under *Cohen vs. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), where (1) the defendant was a public official asserting a defense of

"qualified immunity" and (2) the issue appealed concerned, not which facts the parties might have been able to prove, but rather whether or not certain given facts showed a violation of "clearly established" law. *Johnson vs. Jones*, 115 S.Ct. 2151, 2155 (1995).

The issues presented by Dr. Mazick in his appeal to the Eleventh Circuit are precisely those envisioned by *Mitchell* and *Johnson*. First, Dr. Mazick was "a public official asserting a defense of qualified immunity" and secondly, the issue he appealed concerned whether or not certain given facts showed a violation of "clearly established" law.[2]

Unquestionably, the Eleventh Circuit had jurisdiction to hear Dr. Mazick's appeal. As this Court recognized in *Johnson*, the district court's denial of a defendant's motion for summary judgment on the qualified immunity issue is immediately appealable because it is "effectively unreviewable", because the review held after trial would come too late to vindicate one important purpose of the defense of qualified immunity, that is, to protect public officials not simply from liability, but also from the burdens of litigation. 115 S.Ct. at 2154 and 2155. The district court's ruling was certainly "final" in one respect, it decided the immunity question. The only effective review is an immediate appeal. Dr. Mazick perfected his appeal within the parameters set forth in *Johnson* and *Mitchell*, and it was properly considered and ruled upon by the Eleventh Circuit Court of Appeals.

---

[2] The verbatim language of the Statement of Issues from Dr. Mazick's brief to the Eleventh Circuit is set forth in the Statement of Case in this Brief in Opposition.

II. PETITIONER'S CHALLENGE TO THE ELEVENTH CIRCUIT'S DECISION OF *LASSITER VS. ALABAMA A & M* IS NOT A COMPELLING REASON TO ISSUE A WRIT OF CERTIORARI IN THIS CASE

Petitioner is unable to demonstrate that any of the considerations found in Rule 10 are present in this case. Rather, Petitioner quarrels with the Eleventh Circuit's application of the facts of this case to existing rules of law.

An examination of the Eleventh Circuit's opinion reveals that it has properly applied existing rules of law established by this Court to the decision in this case. The court began its analysis of the qualified immunity defense by correctly setting forth the principles espoused by this Court in *Harlow vs. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) and *Anderson vs. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Citing from *Anderson*, the court stated "the plaintiff must establish more than broad legal truisms; he or she must demonstrate that the law fixed the contours of the right so clearly that a reasonable official would have understood that his acts were unlawful". Appendix, A-101.

Further quoting from *Anderson*, the Eleventh Circuit noted "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of pre-existing

law the unlawfulness must be apparent". Appendix, A-101, 102.

The Eleventh Circuit opinion then went forward to consider *Youngberg vs. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). The court then carefully described how it would apply to the principles set forth in *Romeo* and other case law which "sets forth the contours of the due process rights recognized in *Romeo*". A-103 and 74 F.3d at 1041.

Therefore, it is apparent that the Eleventh Circuit Court of Appeals was utilizing the very principles of law set forth by this Court to decide the issue on appeal. With those principles in mind, it proceeded first to look at the evidence and stated "we take all reasonable factual inferences in favor of the plaintiffs below". Appendix, A-87, 88. Secondly, the court set out relevant facts pertaining to Dr. Brad Mazick's involvement in the case and concluded "We do not believe that the case law clearly established that a reasonable professional possessing the knowledge that Dr. Mazick had would have known that his actions violated David's constitutional rights". Appendix, A-131, 132.

This methodology tracks the procedures set forth in *Mitchell*, which was reaffirmed by this Court in *Johnson*, as follows:

> . . . All it need determine is the question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or in cases where the district court has denied summary judgment for the defendant on the ground that even under

> the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions defendant claims he took".

115 S.Ct. at 2156.

The Eleventh Circuit is indeed correct. The law was not clearly established as it applied to Dr. Brad Mazick under these circumstances. Not only was there no precedent governing the circumstances, the plaintiff and the district court disagreed even as to the constitutional basis of the alleged "right". Plaintiff's complaint alleged violations of Eighth Amendment rights using a "cruel and unusual punishment" standard while the district court elected to utilize the Fourteenth Amendment due process right and a "professional judgment" standard. If the plaintiff's attorney and district court could not agree on which right was applicable, how can it be said that the law would be clearly established from the point of view of a clinical psychologist?

As was pointed out by Circuit Judge Edmondson in his dissenting in part and concurring in the result in part opinion (A-138) it was not clearly established in 1992 that the due process rights of mental patients *civilly* committed to state institutions under the Fourteenth Amendment would always be the same as those of prisoners *criminally* committed in prison under the Eighth Amendment. He further stated: "The difference between a prison and some other kind of institution and the difference between the Eighth Amendment and the Fourteenth Amendments' due process clause are enough, at least, to cloud the question". A-138. In other words, there was no previous case concerning a facility like Eufaula which has decided whether the residents are to be considered *civilly* committed or

criminally committed. Until this basic ruling is made, one cannot even begin to establish the contours of the rights of the residents at Eufaula as required by *Anderson*.

The Court of Appeals is therefore quite correct in its holding that the case law was not clearly established so as to put Dr. Mazick on notice that he was violating David Dolihite's constitutional rights under the circumstances. It made that decision with reference to firmly established principles enunciated by this Court. It did not decide an important question of federal law that has not been, but should be settled by this Court, nor did it decide an important federal question in a way that conflicts with relevant decisions of this Court. Therefore, there is no Rule 10 consideration present in this case which would justify the issuance of the writ.

CONCLUSION

The Eleventh Circuit Court of Appeals reached a correct result in this case by applying correct principles of law. Jurisdiction indisputably existed for Dr. Mazick's appeal, and it was addressed and decided appropriately in accordance with existing principles of law established by this Court. There is no Rule 10 consideration present which would justify the issuance of a writ and therefore Petitioner's request is due to be denied.

PHILIP S. GIDIERE, JR.
GIDIERE & HINTON
60 Commerce Street
Suite 904
Montgomery, AL 36104
Telephone: (334) 834-9950

August 28, 1996